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No. 88-2013

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES AGEE ATKINS AND
WILLIAM S. HACK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether this tax prosecution, which was based on the creation of deductions through transactions lacking economic substance, denied petitioners due process because the tax laws failed to give them fair notice that their conduct was unlawful.

2. Whether a securities transaction lacks economic substance for purposes of the tax laws if the transaction has no business purpose apart from creating a tax deduction and is not subject to market risk.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 869 F.2d 135. The opinion of the district court denying petitioners' motion to dismiss the indictment (Pet. App. 1b-11b) is reported at 661 F. Supp. 491.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1989. Pet. App. 1d-2d. A petition for rehearing was denied on April 10, 1989. Pet. App. 1c. The petition for a writ of certiorari was filed on June 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were

convicted of conspiring to defraud the United States by impeding and impairing the IRS in the performance of its functions, in violation of 18 U.S.C. 371, and of willfully aiding and assisting in the filing of false tax returns, in violation of 26 U.S.C. 7206(2). Petitioner Atkins was also convicted of willfully making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). Petitioner Atkins was sentenced to two years' imprisonment on the conspiracy count and to four years' probation on the remaining counts. Petitioner Hack was sentenced to four months' imprisonment on the conspiracy count and to four years and eight months' probation on the remaining counts. He was also fined $25,000. The court of appeals affirmed.

1. Petitioner Atkins was the founder and principal owner of a limited partnership called The Securities Groups (TSGS), which created fraudulent tax write-offs for investors in money market instruments, primarily United States government securities. Petitioner Hack was a lawyer and acquaintance of Atkins' family. In its offering memoranda, TSGS represented to investors that it intended to handle their funds with a view toward realizing economic gains. Its true purpose, however, was to produce tax losses for investors seeking to offset unrelated income. TSGS promised 4 to 1 tax write-offs based on investments consisting of 25 percent cash and 75 percent notes. Pet. App. 3a-4a; Gov't C.A. Br. 6-8.

TSGS used two types of securities transactions to create fraudulent tax losses: straddles and repurchase agreements. Each type of transaction had no purpose other than to create tax deductions. Each was also rigged to eliminate any possibility of economic profit or loss. Pet. App. 4a.

A straddle in the securities industries is the simultaneous establishment of "long" and "short" positions in a security or securities. A person is "long" if he has contracted to buy

a quantity of securities for future delivery, speculating that the market price of the securities will rise. A person is "short" if he has contracted to sell securities that he may not yet own, speculating on a decline in the market. Prior to the enactment of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 501, 95 Stat. 323-326, a party to a straddle could, at the end of the tax year, close out the "leg" of the straddle that had a loss and claim a tax deduction in that year. During the next year, the party could close out the other "leg" of the straddle, producing a roughly equivalent taxable gain. The effect of a straddle was thus to shift taxable income from one tax year to the next. Pet. App. 4a-5a.

The ordinary straddle, however, is not free from market risk. As a consequence of market fluctuations, there is no assurance that the gain realized on the second "leg" will equal the loss incurred on the first "leg." Because TSGS was engaging in straddles involving billions of dollars, it undertook to eliminate any possibility of potentially catastrophic losses resulting from market fluctuations. Accordingly, TSGS found accomplices, including Hack, who were willing for a fee to enter into "paper" transactions and secret oral agreements that would result in apparent tax losses, but no economic gain or loss. Under the oral agreements, if market prices fluctuated the parties would alter the transaction to eliminate any gain or loss. Pet. App. 5a-6a; Gov't C.A. Br. 7-8.

TSGS's second method of generating fictitious tax losses involved treasury bill repurchase agreements, known as "repos." Repos are devices for financing the purchase or sale of securities, in which the securities serve as the collateral for a loan, and the borrower repays the loan by repurchasing the security. The interest on the loan may be set in two ways: it may be pegged to the interest rate to maturity of the underlying security ("repo to maturity") or

it may float according to the prevailing market rate ("open" or "term" repo). In a repo to maturity transaction, there is no economic risk, and no basis for the borrower to claim an interest expense deduction, since the interest charges coincide precisely with the interest payable on the collateral security. In an open or term repo, however, there is economic risk, because the interest rate on the loan can be higher or lower than the interest earned on the collateral security. Pet. App. 4a, 7a.

TSGS used repos to generate false interest deductions by reflecting repo transactions on its books as open or term repos, while simultaneously making secret oral agreements to treat the transactions as repos fixed to maturity. The open repos supplied the desired interest deductions, but the secret, unrecorded agreements eliminated the chance of market gains or losses. Pet. App. 7a; Gov't C.A. Br. 11.

Using the foregoing devices, or variations on them, petitioners created hundreds of millions of dollars in fictitious losses. They also backdated or caused to be backdated a large number of documents in order to inflate the amounts of those losses. Further, they disguised fees that were paid to accomplices as trading losses. Finally, they lied to their lawyers, their accountants, and their customers about the schemes. Pet. App. 8a-9a.

2. The district court denied petitioners' motion to dismiss the indictment. Pet. App. 1b-11b. In so doing, the court rejected petitioners' contention that the tax laws were so confused and ambiguous at the time of petitioners' transactions that it would be a denial of due process to subject them to a criminal prosecution. After canvassing the law regarding the deductibility of tax straddle losses, the court explained why any flux or uncertainty in the tax law had no application to petitioners (*id.* at 8b):

> At no time, under any of the statutes relied upon by the defendants, has there been any question but that

> sham and fictitious transactions, whether in the form of straddles or other tax loss devices, do not give rise to tax deductions. Here the indictment clearly alleges that the transactions referred to were sham, false, contrived and created by various manufactured acts all for the purpose of defeating the payment of proper income taxes due from the partnership, the defendants and the individual limited partners. If in fact the transactions were carried out for the purposes alleged, the defendants' fine-spun argument suggesting a doubt existed as to the deductibility of the tax straddle losses is without substance.

The jury was instructed that the "heart of the case" was whether TSGS's transactions lacked "economic substance." To guide the jury's deliberations regarding that issue, the court gave the following instructions:

> I instruct you that you must find that the transactions in government securities were without economic substance only if you first conclude beyond a reasonable doubt both of the following propositions:
>
> One, that the transactions had no business purpose, apart from the creating of a tax deduction, and,
>
> Second, that the transactions were subject to no market risk.
>
> With regard to the first one of these propositions, no business purpose, I instruct you that transactions have no business purpose apart from creating a tax deduction if they are not intended either to make or preserve any profit or to limit a loss in any way.
>
> With regard to the second of these matters, that is, market risk, I instruct you that transactions are subject to no market risk if changes in market prices cannot have any effect on the transactions.

Gov't C.A. Br. 62-63 n.* (quoting Tr. 5686-5688). The jury convicted petitioners on all counts in which they were charged.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioners' claim that they were denied due process because they did not know in advance that their conduct was unlawful: "In view of the proven falsification and backdating of documents, the secret oral agreements, the lies and the concealment of facts, this argument borders on the specious." *Id.* at 9a. The court also observed that "[a] mind intent upon willful evasion is inconsistent with surprised innocence." *Ibid.*, quoting *United States* v. *MacKenzie,* 777 F.2d 811, 816 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986) (quoting *United States* v. *Ragen,* 314 U.S. 513, 524 (1942)). The court added that "[t]he doctrine of substance versus form is well ensconced in tax law." Pet. App. 9a.

The court also rejected petitioners' reliance on various tax statutes that purportedly legitimized straddle transactions, or, at the least, created confusion about the deductibility of losses from them. See 26 U.S.C. 165(c)(1) (allowing losses incurred in a trade or business); Section 108(a) of the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 630 (allowing the deduction of losses from pre-1982 straddles, if entered into for profit); and Section 1808(d) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2817-2818 (allowing the deduction of losses from pre-1982 straddles when incurred in a trade or business or in a transaction entered into for profit). The court explained that none of these statutes has been applied to "sham" transactions, such as those involved in this case. Pet. App. 10a.

Finally, the court rejected petitioners' contention that "transactions without economic substance" were entirely distinct from "sham" transactions, which petitioners as-

serted covered only the category of "fictitious transaction[s] that in fact never took place." The court held that under the tax laws, the category of sham transactions also includes those "that ha[ve] no business purpose or economic effect other than the creation of tax deductions." Applying that definition of the term "sham," the court approved the jury instructions, which required the jury to find that "the transactions in question were 'without economic substance', *i.e.*, that they had no business purpose apart from the creation of a tax deduction, and that they were subject to no market risk." Pet. App. 10a-11a.

ARGUMENT

1. Petitioners first contend (Pet. 5-8) that the court of appeals erroneously endorsed the view that a defendant may not challenge a criminal statute on vagueness grounds if he had a subjective belief that his conduct was unlawful. Petitioners argue that in that respect, the decision below conflicts with decisions of this Court and other courts of appeals that determine the adequacy of the notice given by a statute under an objective standard: whether a reasonable person would understand what conduct is within its reach.

The court of appeals did not adopt the position petitioners attribute to it. In the passage on which petitioners rely, the court simply rejected the specific contention that petitioners "were deprived of due process because they did not know in advance that their conduct was unlawful." Pet. App. 9a. The court answered that contention by pointing to petitioners' clandestine oral agreements, their falsification of records, and their cover-up activities, which amply demonstrated that petitioners did "know in advance" that their conduct was unlawful. Nothing in the court's opinion suggests that an impermissibly vague

statute can be rescued simply because the defendant has a subjective belief that his conduct is unlawful. The court's focus on petitioners' actual knowledge merely reflected the court's conclusion that this is not a case in which an unknowing party has been trapped by an obscure or ambiguous rule of law about which he was justifiably confused.

In *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d Cir.), cert. denied, 462 U.S. 1131 (1983), which was cited by the court in this case (Pet. App. 9a), the Second Circuit explicitly recognized that an objective test governs the evaluation of whether a criminal statute provides fair notice. Relying on *United States* v. *Harriss*, 347 U.S. 612, 617 (1954), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), the *Ingredient Technology* court said: "a criminal statute must meet the requirements of the Due Process Clause and be sufficiently definite as to 'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.' " 698 F.2d at 96.

It is, of course, well settled that the mens rea element of a statute may bear on whether the statute is impermissibly vague. A requirement of willfulness, which is an element of the two offenses at issue in this case, "relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945); see also *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952); *United States* v. *Ragen*, 314 U.S. 513, 524 (1942); *Gorin* v. *United States*, 312 U.S. 19, 26-28 (1941); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502-503 (1925). As the Court observed in *Ragen*, referring to then-current tax evasion provisions, "[o]n no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence." 314 U.S. at 524.

Although petitioners contend (Pet. 14-15) that the statutes under which they were convicted did not define the proscribed conduct with sufficient specificity to support a criminal conviction, Congress cannot be expected to define with particularity every possible kind of sham transaction the criminal mind may devise. That observation applies with particular force to the revenue laws because they embrace the entire universe of the nation's economic life. This Court has noted that "Congress did not define or limit the methods by which a willful attempt to defeat and evade [taxes] might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation." *Spies* v. *United States,* 317 U.S. 492, 499 (1943). Cf. *United States* v. *National Dairy Corp.,* 372 U.S. 29, 31-33 (1963); *United States* v. *Petrillo,* 332 U.S. 1, 7 (1947); *Nash* v. *United States,* 229 U.S. 373, 377 (1913) (Holmes, J.).

This is not a case in which the underlying conduct lay close to the line between the unlawful and the lawful, and in which the absence of more precise statutory direction resulted in fundamental unfairness to petitioners.[1] Contrary to petitioners' suggestion (Pet. 8), the rigged, prearranged transactions involved in this case did not present a close question of legal interpretation under the tax laws. It has long been the law that the economic substance of a transaction prevails over its form, and that paper arrangements having no economic purpose but to secure tax bene-

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[1] Petitioners' contention (Pet. 5-6) that this case conflicts with *United States* v. *Kozminski,* 108 S. Ct. 2751 (1988), is incorrect. *Kozminski* holds only that a statute that is entirely vague cannot be remedied by requiring the defendant to harbor some specific intent. That is not the case here. The core concept of tax fraud is objectively well defined. The intent requirement in tax prosecutions serves to protect against the use of the criminal laws to punish a good faith violation of the tax code. *United States* v. *Ragen, supra.*

fits can be attacked as shams. See, *e.g.*, *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945); *Griffiths* v. *Commissioner*, 308 U.S. 355, 357-358 (1939); *Higgins* v. *Smith*, 308 U.S. 473 (1940); *Gregory* v. *Helvering*, 293 U.S. 465, 468-469 (1935).

Petitioners' reliance (Pet. 8) on *Smith* v. *Commissioner*, 78 T.C. 350, 385-394 (1982), to support a claim that the law regarding "economic substance" was unclear when petitioners embarked on their tax-straddle scheme is completely misplaced. *Smith* involved silver straddles, purchased through a broker, that involved some "economic risk." *Id.* at 363, 389-390. Nothing in *Smith* suggests that the petitioners' straddles, which involved secret oral agreements to remove *all* market risk, were even arguably valid. Indeed, Congress later took it for granted that rules permitting the deduction of certain straddle losses would not apply "where the trades were fictitious, prearranged, or otherwise in violation of the rules of the exchange in which the [commodities] dealer is a member." H.R. Rep. No. 426, 99th Cong., 1st Sess. 911 (1985). Moreover, on its facts, *Smith* gave little comfort to the promoters of tax-motivated straddles. The *Smith* court held that the losses from the straddles before it were *not* deductible because the taxpayers using them had "lacked the requisite economic profit objective" under 26 U.S.C. 165(c)(2). 78 T.C. at 394.[2]

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[2] Because petitioners' tax treatment of the transactions in this case was clearly unlawful, the application of the criminal tax statutes did not constitute prosecution for a transaction of uncertain status, as in *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974), and *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). See *United States* v. *Burton*, 737 F.2d 439, 444 (5th Cir. 1984) (*Garber* applicable only where "the legal duty pointed to is so uncertain as to approach the level of vagueness"); *United States* v. *Heller*, 866 F.2d 1336, 1342

2. Petitioners next contend (Pet. 8-14) that the court of appeals' definition of a transaction that lacks "economic substance" is incorrect and is contrary to the definition employed by other courts of appeals.

a. The court of appeals held that petitioners' securities transactions could be found to be "shams," lacking in economic substance for purposes of the tax laws, if (1) they were not intended to make or preserve a profit or limit a loss, and (2) they were not subject to market risk. The jury was instructed accordingly. Pet. App. 10a-11a. Petitioners insist that the jury should also have been instructed to consider other factors in determining whether the transactions had "economic substance." In particular, petitioners urge that the jury should have been instructed to consider whether there were "economic consequences * * * independent of those generated by the tax deductions," including "credit risks" and "financial limitations" that may have foreclosed "other investment opportunities." Pet. 9, 13.

The jury instructions approved by the court of appeals were fully consistent with long-settled principles governing "sham" transactions. This Court has held that a transaction is a sham when there is "nothing of substance to be realized by [the taxpayer] beyond a tax deduction." *Knetsch* v. *United States*, 364 U.S. 361, 366 (1960). A transaction will not be recognized for tax purposes unless it serves valid and substantial nontax purposes. *Gregory* v. *Helvering*, 293 U.S. 465, 469-470 (1935) (disregarding a "corporate reorganization" that had no business purpose but to channel funds to the taxpayer so as to reduce taxes); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 333-334 (1945) (disregarding a "liquidating dividend" that

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(11th Cir. 1989) (*Garber* and *Critzer* involve "[l]egal uncertainty * * * deriv[ing] from arguably conflicting government pronouncements on narrow issues of law").

was designed solely to enable the reduction of taxes incident to a corporation's sale of property). "The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." *Higgins* v. *Smith,* 308 U.S. 473, 477 (1940) (disallowing a loss deduction realized upon the taxpayer's "sale" of securities to his wholly owned corporation).

Both in this case and in others, the court of appeals has demonstrated its understanding of the concept of a sham transaction. See *DeMartino* v. *Commissioner,* 862 F.2d 400, 406 (2d Cir. 1988) ("A transaction is a sham if it is fictitious or if it has no business purpose or economic effect other than the creation of tax deductions."); *United States* v. *Philatelic Leasing Ltd.,* 794 F.2d 781, 786 (2d Cir. 1986) ("A transaction is a sham if motivated solely by tax avoidance purposes with no independent legitimate economic or business substance.").

Obviously, the general principles contained in those statements require focusing and channeling as applied to a specific set of facts in order for a jury to deliberate meaningfully about "economic substance." The jury instructions in this case accomplished that objective. The instructions reflected the fact that genuine transactions in securities markets aim at the making of profits or the avoidance of loss, and they are exposed to market risk. Securities transactions lacking those features are properly characterized as lacking economic substance. Accordingly, the instructions here guided the jury's attention to petitioner's profit motive and the existence of market risk in their securities transactions. In so doing, the instructions properly gave concrete content to the idea of a sham as

applied to the securities straddles and repos that were at issue.[3]

None of the other factors identified by petitioners are relevant to the determination whether their securities transactions had economic substance. Petitioners point (Pet. 13) to various business effects that TSGS allegedly experienced from engaging in its prearranged straddles and repos. Those include making and receiving "margin payments," incurring "credit risks," and forfeiting other "investment opportunities." Petitioners contend that these "non-price economic effects" could have lent substance to their transactions if the jury had been instructed to consider them.

Petitioners' views about the type of "economic effects" that are relevant to a transaction's economic substance find no support in the policies of the criminal tax laws. Incidental costs such as those noted by petitioners could not have transformed their riskless, prearranged transactions into ones having economic substance for tax purposes. Virtually any transaction, no matter how much of a "sham," has some of the consequences that petitioners describe. If such inevitable, incidental "effects" could lend economic substance to a transaction, there would be no

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[3] Contrary to petitioners' contention (Pet. 10), the court of appeals did not condemn *all* tax-motivated transactions lacking market risk. The extreme hypotheticals posed by petitioners bear no relation to the facts of this case. For example, the court of appeals has never applied its economic substance analysis to invalidate the activities of tax-free pension funds (which are protected under other policies expressed in the tax laws), a mortgage-interest deduction that makes possible the purchase of a home (and which gives the taxpayer the benefits of ownership), or the sale of stock following a market decline solely in order to deduct the loss (which in any event is governed by statutory "wash-sale" rules to protect against the artificial realization of a loss, see 26 U.S.C. 1091 (1982 & Supp. V 1987)).

limit to the types of frauds that defendants could explain away as having "economic substance." A check kiter, for example, could claim that his circular transfer of funds had "economic substance" because of the payment of transaction fees to a bank. And a nonexistent transaction—one that "happened" only on paper—could be defended as having substance because it had the "economic effect" of foreclosing other investments once it was presented on a company's books. Adoption of petitioners' approach would frustrate the enforcement of the criminal tax laws against nearly all sham transactions.

Petitioners assert (Pet. 11) that *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 583-584 (1978), and *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 736-739 (1977), require consideration of a range of factors not contained in the jury instructions here. Neither case, however, purports to give a laundry list of factors that *must* be considered in measuring economic substance. Rather, in each case, the Court carefully focused on the specific considerations that were relevant to the particular transactions before it. See *Frank Lyon*, 435 U.S. at 576-580 (considering whether a sale-and-leaseback transaction was in reality a financing arrangement; in that setting it was relevant that the lessor assumed credit risks and disclosed a liability on its balance sheet); *Consumer Life*, 430 U.S. at 737 (considering whether a reinsurance transaction was a sham; in that setting it was relevant that the parties negotiated at arm's length and created genuine obligations). Just as the Court in those cases selected relevant factors for discussion, the court of appeals in this securities-related tax fraud case targeted market risk and a profit expectation as the relevant factors for consideration. That approach is entirely consistent with *Frank Lyon* and *Consumer Life*.

At bottom, petitioners' argument simply reduces to the proposition that the costs of perpetrating a tax fraud can legitimize the fraud. Petitioners never explain why this should be so, and such a proposition is plainly unacceptable from the vantage point of sound administration of the revenue laws. In this case, the jury's determination that petitioners' transactions were arranged without market risk or the expectation of profit left only one plausible function to be ascribed to them: the generation of fictitious tax losses.

b. Petitioners contend (Pet. 9) that the decision of the court of appeals conflicts with decisions of the Sixth, Seventh, and Ninth Circuits, in *Rose* v. *Commissioner*, 868 F.2d 851, 853 (6th Cir. 1989); *Yosha* v. *Commissioner*, 861 F.2d 494, 500 (7th Cir. 1988); and *Collins* v. *Commissioner*, 857 F.2d 1383, 1385 (9th Cir. 1988). Those decisions, they argue, hold that "a transaction lacks economic substance only if it has no 'economic effect' other than those generated by the tax loss" (Pet. 9). That test, they contend, is broad enough to embrace the collateral economic consequences of the straddle and repo transactions that petitioners claim can be found here. See Pet. 11-13.

The decisions on which petitioners rely do not hold that a securities transaction has economic substance for tax purposes even if the transaction lacks a profit motive and market risk. Those cases simply use different verbal formulations to state that a "sham" transaction is one that produces no economic expectation of profit and bears no risk of loss for the taxpayer, but is arranged solely to yield a harvest of tax deductions.[4] A brief examination of the

[4] The court of appeals in this case recited and applied a formula that is virtually indistinguishable from those quoted by petitioner from other circuits: "A sham transaction is one having no economic

facts of *Rose, Yosha,* and *Collins* confirms that there is no conflict between those cases and this one.

In *Rose,* the court upheld the determination that a particular tax shelter—the purchase, based on inflated appraisals, of photo screen negatives for the production of fine arts posters—was a sham because "the taxpayers had no honest profit motive and * * * obtained [no] information on the commercial viability of the packages." 868 F.2d at 854. The court did not pause to consider whether the disclosure of the venture on the taxpayers' financial statements may have foreclosed other investment opportunities, or whether some incidental fees paid to accountants or others gave the transaction substance.

Likewise, in *Yosha,* the court considered a complex commodities straddle, which, like petitioners', boiled down to the risk-free sale of tax losses with no expectation of profit. The court explained that the transactions were shams because "[s]traddles that involve no market risks are not economically substantial straddles and hedges; they are artifices created by accomplices in tax evasion, the brokers." The court added that "[t]he lack of substance lies in the fact that the investor had zero prospect of gain or loss. The brokers were selling tax losses." 861 F.2d at 500-501. These are the same factors relied on by the court here. *Yosha* plainly did not embrace a rule that would confer economic substance on contrived transactions merely by pointing to some incidental economic effects.

Finally, in *Collins* the court agreed with the Tax Court that a mining tax shelter lacked economic substance. Although the court declined to apply the Tax Court's "generic tax shelter" analysis, it held that an examination

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effect other than to create income tax losses." Pet. App. 10a (quoting *Neely* v. *United States,* 775 F.2d 1092, 1094 (9th Cir. 1985)). Cf. Pet. 9.

of the "taxpayers' profit motive and the venture's economic substance" (857 F.2d at 1385) led to the conclusion that the shelter at issue in that case did not have a sufficient economic purpose to justify the creation of legitimate tax deductions.

Thus, rather than revealing any split among the circuits, *Rose, Yosha,* and *Collins* confirm that there is substantial agreement on the application of the "economic substance" doctrine. See also *Ratliff* v. *Commissioner,* 865 F.2d 97, 99 (6th Cir. 1989) (adopting *Yosha*); *Keane* v. *Commissioner,* 865 F.2d 1088, 1091-1092 (9th Cir. 1989) (straddle transactions that were not designed to produce real economic gains lacked economic substance); *Friedman* v. *Commissioner,* 869 F.2d 785, 792 (4th Cir. 1989) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

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